SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. .....

JOHN P. NICK and CLYDE A. WESTON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Eight Circuit is not yet reported, but will be found at record pages 915-938.

JURISDICTION.

The opinion of the Circuit Court was rendered on August 30, 1941; rehearing denied October 1, 1941. On the 6th day of October, 1941, an order was entered staying the mandate of the Circuit Court of Appeals for the purpose of permitting the within application for writ of certiorari.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended.

STATEMENT OF THE CASE.

The statement of the case is contained in the petition.

SPECIFICATIONS OF ERROR.

I.

The Circuit Court erred in holding the indictment sufficient at law.

II.

The Court erred in holding that the Anti-Racketeering Act is constitutional.

III.

The Court erred by holding that witnesses could testify to hearsay statements, conclusions and third-party conversations out of presence of defendants.

IV.

The Court erred in holding that the verdict of the jury is supported by any competent evidence.

V.

The Court erred by refusing to consider petitioners' requested instructions.

VI.

The Circuit Court erred in holding that the trial court's charge to the jury was proper, inasmuch as such charge misstated the law and was prejudicial.

VII.

The verdict of the jury is inconsistent, inasmuch as it finds the defendants not guilty of the twelfth count of the indictment, which contains all the essential allegations contained in the first eleven counts on which the defendants are found guilty.

ARGUMENT.

I.

The Circuit Court Erred in Holding the Indictment Sufficient at Law.

(a) **History and interpretation of act.** The Anti-Racketeering Act, Sections 420a to 420e, Title 18, U. S. C. A., was enacted June 18, 1934. The first bill was passed by the Congress (C. R. 78, p. 5735); organized labor objected to it as being dangerous to labor (C. R. 78, p. 5859); the original bill was withdrawn. The Attorney-General conferred with labor; a new bill was written excluding bona fide labor organizations and their legitimate activities from the bill and passed in the present form (C. R. 78, pp. 11402-3, 11482).

This Act seems to be an extension of the Sherman Act to cover stoppage of interstate goods in transit. Senate Report 532, C. R. 78, 5732.

There are three reported cases construing the act, viz.:

United States v. Gramlich (D. C. Ill., 1937, 19 F. Supp. 422), holding indictment sufficient.

United States v. McGlone (D. C. Pa., 1937, 19 F. Supp. 285), holding labor exempted under section 420d.

United States v. Local 807 (C. C. A. 2, 118 F. [2nd] 684, certiorari granted 10-13-41), holding union excluded where money was obtained by force and violence in the guise of wages, though no labor was performed, only offered to be performed.

The case at bar holds the obtaining of money by labor's agents in connection with wage negotiations under threat to strike to be a violation.

The Second Circuit, in commenting on the act, said, "The whole statute is very loosely drawn." In order to give meaning to the act, it is necessary to read it as follows:

> Any person who obtains * * * by the use * * * or threat to use force, violence or coercion, payment of money * * * (not wages) in connection with or in relation to **any act** (which) in any way or in any degree affects trade or commerce, etc.

Thus, the act requires the doing of three separate and distinct acts. First, the stoppage of interstate commerce; second, a threat to use force and violence or coercion; and third, the taking of money.

The words "any act" must refer to the act committed against commerce, and such act must be distinct and independent of and a necessary prerequisite to the threat.

A threat to call a labor strike, being a lawful act, cannot constitute the first required act. The obtaining of money in connection with labor negotiations cannot constitute the third act, because section 420d exempts labor from responsibility for threats of force and violence occurring during labor negotiations (Point 17, R. 62, Motion to Quash; Points 10, 11, 12, R. 70-71, Demurrer).

> "Furthermore, the proviso to section 420 (d), although that too is most obscure, at least shows a vague intention to discriminate between violence in labor disputes and elsewhere." United States v. Local 807, 118 F. (2nd) 684, C. C. A. 2.

Furthermore, the operation of a projecting machine in a St. Louis theater is not an interstate commerce operation. The exhibition itself, of a motion picture film, is state commerce and beyond interstate regulations (United States v. Interstate Circuit, 20 Fed. Supp. 868).

Moreover, even if the operation of motion picture ma-

chines were interstate commerce, films were not the subject of petitioners' activities; wages of operators was the thing in dispute.

The labor policy of the United States, as expressed in the National Labor Relations Act, Sec. 151, Title 29, U. S. C., is to "encourage the practice and procedure of collective bargaining by protecting the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purposes of negotiating the terms and conditions of their employment or other mutual aid and protection." The Norris-La Guardia act, Secs. 104-105, Title 29, U. S. C., forbids federal courts issuing injunctions against labor organizations and its members from "ceasing to work" (striking) or "advising or notifying any person" to cease working. This Court has ruled, in United States v. Hutcheson, 312 U. S. 219, that these acts enumerating the labor policy of the United States must be interlaced and construed with the Sherman Antitrust Act when determining whether labor substantially and directly restrained interstate commerce. The same reasoning ought to apply to a construction of the Anti-Racketeering Act where it is applied to a set of facts growing out of collective bargaining by a bona fide labor organization negotiating for a wage contract. Since the indictment shows on its face that petitioners were representing the IATSE (R. 15 and 16, Pars. 10 and 11), a bona fide labor union, and negotiated the 1937 contract providing for hours and wages (R. 19, Par. 17), a legitimate objective, it brings itself squarely within the exemption in proviso to section 420d and, therefore, fails to state an offense under the act.

It is plain that counts one and two cover the same alleged conspiracy and that counts six and seven cover the same conspiracy. Each conspiracy is split contrary to the

Court's decision. In re Snow, 120 U. S. 274. It will be noted the Circuit Court failed to rule on this assignment (R. 925-926).

Three separate and distinct acts were joined in the indictment. The second transaction had nothing to do with the first and the third transaction did not grow out of either the first or second. These were not offenses that might be "properly" joined under 557, Title 18, U. S. C. A. Beaux Arts v. United States, 9 F. (2nd) 531. Misjoinder was raised in demurrer (R. 61[8]-70[9]) and motions to elect (R. 80-575, 802).

II.

The Court Erred in Holding that the Anti-Racketeering Act Is Constitutional.

(a) **Denies defendants freedom of speech.** In Thornhill v. State of Alabama, 310 U. S. 88, this Court held:

> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution (cases cited).
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> • • • • • • •
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> "We concur in the observation of Mr. Justice Brandeis, speaking for the Court in Senn's case (301 U. S., at page 478): 'Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.'
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> • • • • • • •
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> "It does not follow that the state in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern. A contrary conclusion could be used to support abridg-

ment of freedom of speech and of the press concerning almost every matter of importance to society."

It would be an anomalous situation which permits labor leaders to inform the public of a controversy, but punishes them for communicating their demands to the employers. **If the Government can police the conversations between the employee and the employer and prosecute the employee because he makes high demands, such is tantamount to denial of freedom of speech.** Freedom of speech in a labor dispute is essential. If it can be curtailed by the employer merely reporting to the Government that the demand for wages is high and excessive, then the beneficent labor policy announced by Congress in the Clayton, Norris-La Guardia and Wagner Acts has been completely nullified and labor's lips have been sealed. Unless this act wholly exempts labor, it is unconstitutional. There can be no halfway station. If it is not unlawful to strike and picket, how can it be unlawful to threaten to strike and picket?

(b) **Violates the Tenth Amendment.** The act is so broad as to be unreasonable. It attempts to cover every crime which in any way, however remotely or indirectly, touches an article which might have at some time in the past or any time in the future pass state borders. The act offends the principles laid down in the following cases:

Standard Oil v. United States, 221 U. S. 1;
United Mine Workers v. Coronado Co., 259 U. S. 344;
United Leather Workers v. Herkert, 265 U. S. 457;
Levering & Garrigues v. Morin, 289 U. S. 103;
Apex v. Leader, 310 U. S. 469;
United States v. Hutcheson, 312 U. S. 219.

In United States v. Fox, 95 U. S. 670, the Court said:

"But an act committed within a state, whether for a good or bad purpose, or whether with an honest or a criminal intent, cannot be made an offense against the

> United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States. An act not having any such relation is one in respect to which the state can alone legislate."

In Schecter v. U. S., 295 U. S. 495, this Court said:

> "* * * the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the federal power, and for all practical purposes we should have a completely centralized government. We must consider the provisions here in question in the light of this distinction."

Article IV, Section 4, of the Constitution, expressly reserves the right of the states to deal with domestic violence:

> "The United States shall guarantee to every state in the Union a Republican form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence."

Title 18, Section 420a, undertakes to deal with domestic violence. Therefore, it is unconstitutional. Does the Congress have the right to invade state jurisdiction and deal with domestic violence under the Commerce Clause?

(c) **Fifth Amendment**: If the Congress intended to exercise concurrent jurisdiction with the states on crimes of extortion and violence committed in interstate commerce, it should have provided for concurrency with the states and provided against double jeopardy in order to save the constitutionality of the act along the lines provided

under Section 410, Title 18 (thefts from interstate shipments) and Sections 412 and 412a, Title 18 (embezzlement by an officer of an interstate carrier), without which the act violates the Fifth Amendment in that it places an individual in double jeopardy.

III.

The Court Erred by Holding That Witnesses Could Testify to Hearsay Statements, Conclusions and Third Party Conversations Out of Presence of Defendants.

The amazing disregard of rules of evidence by the trial court calls for reversal of this case. The assignment of errors sets forth thirty-two pages of hearsay evidence (R. 868-900), third party conversations and telephone conversations between third parties held outside the presence of defendants. Witnesses were permitted to state what was running through their minds, even their appraisal of mental attitudes of third parties. One witness was permitted to relate a conversation he had with a newspaper reporter. The record contains reams of this sort of testimony. We urgently request the Court to read the record from pages 261 to 405 (note the testimony was let in over the objection and exception of petitioners). The Court will note the objections and exceptions throughout the record. Note objection and exception at record 262, the ruling of the Court that objection and exception stood to all such testimony (R. 263, 267, 324, 346, 351, 359).

At record 262, over objection and exception, Wehrenberg relates a third party conversation with Kaimann. Objection, exception, motion to strike and motion for mistrial preserved in Assignments of Error (R. 870-1; Kaimann's statement was a conclusion based on past events and therefore not properly admissible. McLaughlin v. U. S., C. C. A. 3, 26 F. 2d 1).

At record 263 the witness relates what one Kaimann, a third party, is reported to have told a newspaper reporter in 1936. A mistrial was moved at record 264. At record 270, the same witness testified concerning a telephone conversation he had had with a third party (Thimmig) out of the presence of petitioners. At record 274-5, the Government complained to the Court that it could not make its case unless this hearsay was admitted, whereupon the Court obligingly reversed himself and let the hearsay in. At record 321 Thimmig testified to what Kaimann said; at record 324, to a conversation between Kaimann and himself; at record 325, as to Kaimann's attitude. At record 347, Kaimann relates a newspaper report of his conversation. Note objection, exception, motion to strike and motion for mistrial.

Witness Komm (R. 364) is permitted to testify to a telephone conversation he had with Thimmig. Louis K. Ansell (R. 368-370) is permitted to testify as to what Arthur had said to a group out of the presence of the defendants after he had had a conversation with them and as to the group's attitude. Witness Arthur (R. 384) relates a conversation he had with the Ansells and Bess Schueler regarding their attitude on making a payoff if the matter should come up. This conversation took place before any negotiations had ever been opened with the defendants. Witness Rosecan testified concerning conversations he had had with Tom Canavan out of the presence of the defendants (R. 494). This witness also testified about a conversation held with Mr. Ansell. Witness Sanowski (R. 498) is permitted to testify to conversations he had with Mr. Canavan.

The foregoing are only a few of the hearsay statements and third party conversations shown in the record and assignment of errors.

In Mima Queen v. Hepburn, 7 Cranch. 289, 3 L. Ed. 348, by Marshall, C. J., hearsay is held inadmissible, not only because it supposes better evidence, but also

> "its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible."

The Circuit Court holds (R. 930) such testimony admissible to show a state of mind, overlooking that it is thereby permitting one of the parties to a written contract to testify to matters merged in the contract. The state of mind of the exhibitors was absolutely irrelevant to this case and the proviso in 420-d is a rule of evidence as well as a prohibition when applied to this case. Rather than permitting a relinquishment of the rule against hearsay, as the Court would, the statute forbids consideration of employers' mental state. Had the theatre owners granted the demand for higher wages this case would have died a-borning.

The kind of fear, if any, suffered by the exhibitors was not a genuine fear, such as contemplated by the act, but was merely a state of anxiety present in the mind of any employer when negotiating with his employees for a wage contract, who knows that if the demands of the employees are not met a strike may ensue. Indeed, the testimony in this case showed that wage negotiations in themselves implied the threat of a strike (R. 400). If the fear created by demands for higher wages creates coercion, actionable under this act, collective bargaining has ended.

The Circuit Court holds (R. 930) that unless there is some form of compulsion there is no crime under this act. The act provides that the compulsion which results from the activities of a bona fide labor organization in pur-

suing an objective must not be construed by a court to be actionable force or violence, fear or coercion. Every demand for higher wages, shorter hours and better working conditions creates compulsion.

The Circuit Court says (R. 930): "If the exhibitors had paid this money of their own initiative and voluntarily, there would have been no violation of the act." We respectfully suggest that there is nothing in the record to show that they did not pay it voluntarily. The payment, if any, to petitioner Weston was voluntary. The owners were not forced to pay it. If they did pay him they did so for purposes of their own. They exercised their judgment and will by choosing to raise money. The Court's decision is erroneous under its own hypothesis.

After all, what connection with or relation to interstate commerce does the giving of money to union agents by theatre owners have, whether it is given as a bonus or as a good-will offering as insurance against higher wages for their employees? In any event, it belongs to the principal, the union, and must be accounted for by the agents.

The means, methods and manner of the negotiations cannot be the subject of prosecution under this act. Congress knew abuses in these means and methods could arise, but in the interests of the national labor policy chose to leave their punishment to the states, just as Congress leaves the punishment of many other local crimes to the states. There are many heinous crimes committed every day which are not matters for federal jurisdiction, but must of constitutional necessity be left to the state government for punishment. Federal jurisdiction does not arise from the ethics of the deed, but must spring from a power delegated to the United States. The Congress must have recognized the possibility of labor being charged for extortion in communicating the wage demands, and for that reason ex-

empted it from operation of the act. Employers could contend any amount above that which they wished to pay to be extortion and bring about a prosecution. This distinction is clearly recognized in United States v. Local 807, 118 F. (2nd) 684, where the Court said (l. c. 688):

> "It is not unreasonable to ascribe to Congress the purpose of observing this distinction and of leaving to the states the maintenance of order in cases of disorders in labor disputes. True, it may be asked why Congress should not also have left to the states the suppression of such disorders as the act indubitably does forbid. That we cannot answer, and indeed it would not be proper for us to import the distinction which we have, if the language used did not demand it. We have tried to show how it was the inevitable consequence of what was said; and it fortifies our conclusion that there was a possible purpose for the distinction. Furthermore, the proviso to section 420d, although that, too, is most obscure, at least shows a vague intention to discriminate between violence in labor disputes and elsewhere."

Does a fancied state of mind of the employers render admissible the many third-party conversations held out of the presence of petitioners?

> "In a criminal prosecution, conversations and statements of third parties, not made in presence of defendant or hearing of defendant, are incompetent hearsay."
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> State v. Woodward, 90 S. W. 90, 191 Mo. 617;
> U. S. v. Burr, 14 Fed. Cas. 694, Coombs on Aaron Burr 369;
> Bass v. U. S., 20 App. D. C. 232.

Does a supposed state of mind render the conclusions of witnesses admissible? In Masonic Home of Missouri v. Windsor, 92 S. W. (2nd) 713, 338 Mo. 877, the Court said:

> "What witness did 'not know' or what 'impression'

> he may have had, or what he 'thought' or 'understood' or 'supposed' or 'figured' did not rise to dignity of evidence establishing issuable facts, and such observations, except 'I don't know,' were mere conclusions, and not evidence of probative value."

There was no evidence of any threat being made by petitioners. Even if there had been evidence of a threat to strike, that in itself would constitute no violation of this act. However, the Government deemed it necessary to its case to use this inadmissible testimony in order to create a mysterious inference of implied threat and thereby invited reversible error.

IV.

The Court Erred in Holding the Verdict of the Jury Is Supported by Any Competent Evidence.

It must be borne in mind that the indictment alleges that petitioners "directly and substantially affected commerce," not merely that they "interfered with commerce." Allegata et probata. United States v. Gramlich, supra. There is no proof whatever of even an indirect or remote interference with interstate commerce, but even if there was proof of interference, it, in itself, would not support the conviction in the absence of proof that such interference was direct and of a substantial nature. The Government attempted to prove, by inadmissible hearsay evidence, that there was an implied threat of a strike in connection with wage negotiations. If it had proven this fact the evidence would still be insufficient, because strikes and threats to strike are permissible under the labor policy of the United States. However, the so-called implied threat to strike is nothing more than an inference or presumption based upon presumption, and shows what possibly **might have** happened and how **maybe** commerce **could**

have been interfered with **if** * * *. The Government relied upon the testimony of witnesses Wehrenberg (R. 240), Thimmig (R. 317), Kaimann (R. 341), Pappas (R. 357) and Komm (R. 361). It established by each of these witnesses the fact that negotiations were under way between the IATSE, a bona fide labor organization, and the theatre owners. The Government, having established this fact, thereby brought the case under the exception contained in the proviso of Section 420d and all subsequent testimony became irrelevant and incompetent. A careful analysis of the evidence disproves that interstate commerce was directly and substantially interfered with or that any article of interstate commerce was involved. The only question before these contracting parties was the wages of the moving picture operators in St. Louis. Further analyzing we see that no actual threat even to strike was made by the petitioners, but rather that the committee inferred or presumed that if they refused to pay the wages asked a strike might ensue. Therefore, rather than pay the rate of wages asked, the committee initiated a plan of its own to circumvent the payment of higher wages and sent one of their members (Thimmig) to petitioner Weston and arranged to give him a sum of money. Members of the committee testified that this sum of money was raised without considering the consequences of a strike and without any fear. Witness Thimmig testified (R. 331):

> "Q. Did you consider the consequences of a strike? A. We didn't get that far. Naturally, if we didn't have no contract, I imagine they would have pulled their men or something. We never got that far."

Witness Komm (R. 362):

> "Q. Let me ask you, what was your own state of mind, your own attitude? These negotiations had proceeded for several meetings and they had insisted on $30.00 per man, and did that create in your mind any

question that Nick and Weston were expecting any pay-off? A. Well, I don't know. During that time that we spoke to them they had never gave me the least thought that they expected anything.

Q. They never said they wanted a pay-off? A. They never said at any time that they expected anything from the committee."

Whether the theatre owners were afraid of a strike was irrelevant to any issue in this case, in view of the labor policy of the United States as expressed in the Wagner Act and in the Norris-La Guardia Act. The possibility of a strike is implicit in all negotiations between employer and employee. Therefore, any fear of a strike that arises in the mind of the employer could not be actionable under this act. Witness Arthur (R. 400):

"A. Every time you have negotiations, a strike is always implied. If you don't get together with them on negotiations, you are always looking toward a strike. I never had wage negotiations in my life that I didn't anticipate that if we didn't get together the men would walk out."

The Government did not attempt to establish that the operation of a theatre in St. Louis is interstate commerce. It attempted to satisfy the statutory requirements of interstate commerce by showing merely that films pass in interstate commerce and that the distribution thereof is interstate commerce, and that if a strike were to take place in the St. Louis area that the distribution of film would be curtailed. Such might be true as to any product, any part of which passes in interstate commerce, but it is wholly inadequate to show that persons negotiating for wage contracts in St. Louis directly and substantially interfered with or restrained interstate commerce. This Court held, in both Apex v. Leader and United States v. Hutcheson, that where the intention is to enforce the rights

of labor, the possible restraints of trade are beside the point and not actionable.

There is no proof that the theatres could not operate even if a strike occurred. In fact, the proof (R. 779) shows that nonunion operators were available in large numbers; hence, a strike, if called, would not close the theatres. At record page 789 the evidence shows that any intelligent person can learn to operate a moving picture machine in ten or fifteen minutes. It is common knowledge that many persons operate motion picture machines in their own homes. Therefore, the proof is insufficient to show that a strike, which is a permissible thing under the decisions, would close the theatres; so the inference of an implied strike does not confirm the Government's theory. The fact that another union was about to be organized, and some of the theatre owners were flirting with it, shows that other operators were available (R. 354).

There is no proof that the distribution of films was interfered with. The film exchange executives testified that **petitioners did not interfere with film distribution** (R. 112-122-127); therefore, the assumption postulated in paragraph 18 of the indictment, while erroneous in that it intermingles exhibition (noninterstate activity) with distribution, is not supported in any respect. Mr. Schweitzer of Paramount (R. 112) testified that neither of the petitioners had either **kept him from shipping any film or caused him to fail to ship any film.** Mr. Robyn of United Artists testified (R. 122) that he did not know either Mr. Nick or Mr. Weston and that **neither at any time interfered with interstate shipment of films.** Mr. Ray Nolan of RKO testified (R. 127) that in his twenty-one years experience in St. Louis there had never been any **strikes by the operators; that he never in his life saw either of the petitioners; that he did not know of them interfering**

with any of his company's interstate shipments of film. These witnesses testified that they were **never threatened** in any way by either of the petitioners **and not one cent was demanded.** The Government's case collapsed with the testimony of these witnesses.

The evidence under the second transaction, namely, the organization of the Co-operative Sound Service Supply Company, failed to establish even a moral offense. The evidence shows that the manager of that company gave the petitioners a part of the salary paid him by the corporation. The Government contended that because the theatre owners in St. Louis paid the corporation $5.50 per week for sound service that, therefore, the theatre owners had paid money to the petitioners. There was no proof that the Co-operative did not furnish efficient service; in fact, there was proof that its service was better than that of its competitors and that Co-operative charged $5.50 per week for its service while its competitors charged almost three times as much—$15.00 per week (R. 552).

All of the testimony concerning this phase of the case is irrelevant and immaterial to the issue of interference with interstate commerce and no money was obtained from the exhibitors. The servicing of sound equipment permanently placed in St. Louis theatres is not interstate commerce in any sense of the word.

There is no known reason, either legal or moral, why the manager of Co-operative could not give his money to any persons he might choose, including the petitioners. The joining of this wholly distinct transaction in the indictment was erroneous and the admission of evidence under it was prejudicial to the petitioners. It constitutes a practical demonstration of the injustice of permitting the joining of separate and independent transactions and trying them in one trial. When the accused are tried on different

transactions in one indictment, each transaction must be proved, and if there is a failure of proof as to any one the case must be reversed. United States v. Smith (2 Cir.), 112 F. (2nd) 83; United States v. Koch (2 Cir.), 113 F. (2nd) 952; United States v. Graves (2 Cir.), 122 F. (2nd) 89-91.

The evidence under the third transaction was insufficient. It shows, however, that the whole case was tried by the Government and put to the jury by the Court on the theory it is an offense to obtain money in connection with wage negotiations. The proof showed that the Orpheum Theatre was closed and, therefore, not using any film. Fanchon & Marco wished to open it as a second-run house instead of a first-run house, as it had been before its closing. A second-run house could operate with lower salaried operators and fewer stage hands. Arthur, the manager for Fanchon & Marco, loaned petitioner Weston $2,000. There is no proof of any interstate commerce connected with this closed theatre; there is no proof of any threat of any kind; there is no proof of any demand for money. In fact, in the proof of this transaction the Government abandoned its far-fetched theory as to a threat to strike being interference with interstate transportation of film and relied on the theory that the receipt of money in any form by a union agent during negotiations for wages constitutes a violation of the Anti-Racketeering Act.

As to the second and third transactions, it is obvious there are gross variances between the allegations and proof. The record shows that the petitioners demurred to the misjoinder of counts (R. 61 and 70); that motions to elect were filed (R. 80, 577, 802) before, during and at the close of the evidence; demurrers to the evidence were filed (R. 572-804), overruled and exception thereto (R. 573-806) and preserved in the assignments of error (900[24-26]-901).

While the following allegations were irrelevant to the cause being prosecuted, we wish to point out to the Court that the Government failed to sustain the allegation of paragraph 20 that the defendants seized control of Local No. 143. Defendants' Exhibit 3 (R. 633, admitted 632) shows they were placed in control of No. 143 by the national officers, and Defendants' Exhibit 31 (R. 625, admitted 618) shows that the national organization had authority to place them in charge. The allegation that the defendants insured and perpetuated their control over the operators by giving some better jobs than others is not sustained, because the authority exercised by the defendants did not depend upon the operators, but came from the national organization. It is not against the law for union officials to ask for high, arbitrary, excessive and ruinous wages. This is merely a matter of judgment; labor leaders are not required to have perfect judgment, and whether a wage demand is high or excessive depends upon whether you view it as an employer or as an employee. It is not illegal to call strikes or threaten to call strikes.

There was no proof that the union did not receive the $6,500 alleged to have been paid defendant Weston, or that it was not used for the benefit of the union. If the owners gave petitioner $6,500 to get a contract he received it as agent for the union and it must be taken to be a bonus for signing the contract, which is a common practice. There is no evidence, and certainly no law, which prevents theatre owners in St. Louis from raising a fund of money and giving that money away through a committee.

Thus we see that the evidence is wholly insufficient. Viewed from any angle, it will not support the convictions. First, there was no independent act of interference with interstate commerce—films were in no way involved; the

matter was a plain labor dispute; the competent evidence does not even support the allegations that there were threats or implied threats—this was only established by permitting witnesses to testify that they imagined a pay-off was wanted.

The Court should have sustained the defendants' demurrers to the evidence, as did Judge Welsh in the case of United States v. McGlone, 19 F. Supp. 285.

Conspiracy is essentially a crime of intent. The intent of the defendants is shown by the proof to be the securing of a wage contract calling for wages. This they did. They did not intend to interfere with interstate commerce —and did not. Therefore, we refer again to Apex v. Leader, supra, which holds that where a sitdown strike actually interfered with interstate, but because the intent was unionizing employees, there was no unlawful interference with interstate commerce.

V.

The Court Erred by Refusing to Consider Petitioners' Requested Instructions.

The petitioners requested trial court to give 23 instructions (R. 806-817). He refused (Exception, R. 848, assignment 906[39]).

It is not necessary to point out specifically the error of the trial court in refusing requested instructions when the requested instructions clearly state the law and the charge given is contrary to the law.

It is held in Gold v. United States, 102 F. 350 (C. C. A. 2):

> " 'Where a timely request is made for instructions which correctly propound the law and which are warranted by the pleadings and the evidence in the case,

> it is the duty of the Court to give them unless covered by other instructions given, or by the general charge, and a noncompliance with this duty will necessitate a reversal where it cannot be said that appellant was not prejudiced * * *.' "

VI.

The Circuit Court Erred in Holding That the Trial Court's Charge to the Jury Was Proper, Inasmuch as Such Charge Misstated the Law and Was Prejudicial.

The Court's definition of interstate commerce (R. 823-824; exception, R. 844; assignment, R. 901), as applied to the activities of a labor union, was incomplete and inaccurate in that it did not conform to that set forth in Apex v. Leader, 310 U. S. 469, and United States v. Hutcheson, 312 U. S. 219, which decisions specifically hold that so long as a labor union or its representatives do not curtail commercial competition, they do not and cannot affect interstate commerce in such a manner as to be prosecuted therefor.

We ask the Court to note the inconsistency in the Court's charge (R. 823; exception, R. 844; assignment, R. 902):

> "* * * and that the defendants in agreement upon such a plan, if one was agreed upon, knew that the consummation and accomplishment of such a plan would result in directly and substantially affecting interstate commerce in film."

Contrast this with what the Court said at record 824:

> "In that connection you are instructed that it is not necessary to a conviction that the defendants consider the plan itself, the effect the consummation of the plan would have had upon interstate commerce or that the principal purposes or one of the purposes of the conspiracy, if there was one, was to directly or substantially interfere with or affect interstate commerce."

How could there be a conspiracy to interfere with interstate commerce, without a purpose to do so? First, the Court tells the jury that the defendants must know their plan will substantially and directly affect interstate commerce, then the Court says it is not necessary that the purposes shall be to directly and substantially interfere therewith. This is inconsistent. If defendants intended to secure a contract they are exempt under 420d and the incidental results on commerce are immaterial. Apex v. Leader.

In Nicola v. United States, 72 Fed. (2nd) 780, l. c. 787, the Court said:

> "Where two instructions are given to the jury, one erroneous and prejudicial and the other correct, it is impossible to tell which one the jury followed and it constitutes reversible error. When an erroneous instruction has been given, it is not cured by a subsequent correct one, unless the former is withdrawn."

It was error for the Court to instruct on the interstate character of films without instructing as requested in defendant's request No. 5 (R. 808) that the exhibition of films is not interstate commerce.

> "The exhibition itself of a motion picture film is state commerce and beyond interstate regulations" (United States v. Interstate Circuit, 20 Fed. Supp. 868).

In charging the jury, the Court erred in advising them as follows (R. 826, Exception 844, Assign. 902):

> "If the evidence of the witnesses outlining the effect of stoppage of motion picture industry in St. Louis is to be believed and is believed by you, the result, of course, is direct and substantial interference with or effect upon interstate commerce. It is for you to say whether you believe such evidence, not me. I don't mean by that to cast any aspersions on the

evidence at all. As I recall, the evidence was uncontradicted, but that, too, is for you to recall for yourselves."

There was no such testimony. The testimony was simply that there could be a stoppage, but regardless of this a stoppage caused by a strike is not actionable. U. S. v. Hutcheson.

Such an expression and statement by the Court is an unjustifiable and improper comment by the Court upon the evidence and invades the province of the jury. By such a statement the Court as much as says, using the skeleton or meaning of the above-quoted part of the Court's charge: "If the evidence of the witnesses • • • is believed by you, **the result, of course**, is direct and substantial interference with or effect upon interstate commerce." In other words, the jury must believe that there is direct and substantial interference upon interstate commerce if they believe the evidence of witnesses. They are left with no right to an opinion of their own. The Court has told them **"the result, of course, is direct and substantial interference."**

The Court followed up his improper statement, not by telling the jury that they were not bound by his opinion that **"the result, of course, is direct and substantial interference"** and by saying to the jury that it was for them to determine what the evidence means and results in, but by saying to them that his belief or disbelief **in the testimony of the witnesses** was not binding upon the jurors, but **that the jurors were to make up their own minds as to whether or not to believe such evidence**, when, as a matter of law, the jury not only had the right, but had the duty, of determining, first, whether to believe such evidence, and, secondly, whether or not, in their opinion, such evidence did or did not, as the Court said, mean only the one thing which the Court said it did mean, to wit, **"the result, of**

course, is direct and substantial interference with • • • upon interstate commerce."

Brabright v. U. S., 105 Fed. (2nd) 202;
Sunderland v. U. S., 19 Fed. (2nd) 202;
Wilson v. U. S., 117 Fed. (2nd) 253.

The Court charged the jury at R. 823, exception 844, assignment 901 (g):

"The making of a threat or the receipt of money would constitute such an act."

This is not only unfair comment by the Court, but is also an erroneous statement of the law. The violation of this Act, if there can be one, consists of first doing an act that actually interferes with interstate commerce; and, secondly, follows such act by a threat to obtain money by use of force or violence. The threat itself, or the obtaining of the money, is not the act of interference denounced. Before the Court could have given any such instruction in this case the proof would necessarily have to have shown beyond a reasonable doubt that there was an actual stoppage of films which directly and substantially affected interstate nationally, followed by obtaining money by threats.

What is a threat in a case of this kind? It cannot be anything said or done in connection with wage negotiations. The Supreme Court has held in both the Apex and Hutcheson cases that strikes and threats to strike by labor unions are permissible and do not unlawfully restrain or interfere with interstate commerce.

The Anti-Racketeering Act permits the securing of the payment of wages by threats of force and violence (Section 420a). The Anti-Racketeering Act forbids United States Courts from construing it **in any manner** affecting labor organizations; hence, labor organizations or their leaders may use threats of force and violence in their ne-

gotiations for wage contracts (proviso, Section 420d). The use of force and violence is legitimate under this Act and the leading decisions. U. S. v. Local 807, supra.

The Court erred in charging the jury (R. 836, Exception 847) that circumstantial evidence as to petitioner did not cover all counts.

We contend that the Court erred in this instruction, because, as to the defendant John Nick, not only is there no evidence that he was paid or received any money, as said by the Court, but, as will appear from the evidence in this case upon a careful reading, there is no direct evidence in the whole case which would even tend to prove the charge in the light of the Government's and the Court's interpretation of the statute upon which the case is bottomed. So far as the defendant John Nick is concerned, all, if anything, that the Government has shown under each and every count in the indictment, and each and every count under which defendant John Nick was convicted, was circumstantial evidence and such circumstantial evidence as in law will not uphold a conviction, same being one inference from and based upon another inference, and one presumption from and based upon another presumption.

Gargotta v. U. S., 77 Fed. (2nd) 977;
Tingle v. U. S., 38 Fed. (2nd) 573;
Cox v. U. S., 96 Fed. (2nd) 41;
Turinetti v. U. S., 2 Fed. (2nd) 15.

The Court further erred in his discussion of circumstantial evidence, as appears on record page 838:

In this particular portion of the Court's charge it may be noted the Court said: **"The force and value of circumstantial evidence depends upon the number of facts and circumstances established which are consistent with each other and the consistency of those facts and circumstances with**

the truth or existence of the facts sought to be shown.'' Such a statement by the Court as to the measure and value of evidence is so illogical and unreasonable as to condemn itself upon first reading. According to this interpretation the quantity of evidence would determine the issues in a matter rather than the quality of evidence and the weight thereof. Upon this theory a dozen trivial circumstances, only in the slightest connecting a defendant with an offense, would outweigh a single circumstance which might in itself conclusively establish guilt; for example, any number of slight and trivial circumstances could not compare in value in some classes of cases with the single circumstance of finding a defendant's finger prints upon an object connected with the proof of the corpus delicti. By the Court's test of establishing the ''force and value'' of circumstantial evidence the jury is taught to measure evidence by false weights and values.

The Court charged [at R. 839, exception 846, Assign., R. 903 (m)]:

> ''Unless the Government has proven guilt beyond a reasonable doubt, **a conviction must result.''**

This astounding statement is only surpassed by another one made a little later on the same subject. What chance do defendants have for acquittal under such bludgeoning by the Court? On counsel's exception to this prejudicial charge, the Court undertook to cure it by saying it was a slip of the tongue. The liberty of American citizens should not be jeopardized on slips of the tongue. The Court's correction was unavailing. There is no way to unscramble eggs.

The Court charged at record page 841, exception 847, assignment 903, that if petitioners had two purposes, one to secure wages, and another to secure money for themselves, a conviction should result.

Here the Court assumed a legislative role and arbitrarily read foreign matters into the statute, contrary to the congressional intent specifically expressed in this act, and in contravention to the general labor policy of the United States as expressed in the Norris-La Guardia Act and the Wagner Act.

Such interpretation does impair, diminish and affect the rights of labor. **If courts and juries may speculate on the mental processes of labor leaders in order to conjure up a second purpose, it would be hazardous for any leader to ever make a demand for wages higher than existing rates.** He would thereby subject himself to prosecution. **Collective bargaining would immediately end. The employer would thereby be clothed with a more formidable weapon than injunction processes,** swept away by the Norris-La Guardia Act.

This part of the charge constituted an argument to the jury. The Court drove home its point by citing the Dyer Act. The example does not fit this case in any respect. There isn't any proviso in the Dyer Act that labor and labor leaders are exempt from its provisions, as there is in Section 420d. If the Dyer Act had a proviso in it exempting labor leaders who go to Springfield, Illinois, on union business in automobiles, the example might be analogous. The Court's example was ill chosen and misleading. It is indeed dangerous to import other laws into any case, and especially a case of this kind. **When the Government established by the allegations of the indictment and the proof that the defendants were members of bona fide labor unions and represented them in wage negotiations, and further showed that wage contracts were actually consummated, it proved itself out of court.** This Court should have sustained demurrers to the evidence rather than in effect making an argument for conviction.

The Court finally administered a sledgehammer blow in attempting to give the so-called Allen instruction before ever the jury had retired to consider the case. This part of the charge was extremely coercive and practically urged the minority to give in to the majority and **"vote for a conviction"** (R. 842, Exception 847, Assignment 905).

(See attempt to change record by affidavit, R. 851.)

We take it that the reporter's original transcript stands and the record cannot be changed by affidavit. Counsel are firm in the belief that the Court did say, "Vote for a conviction," and our belief is buttressed by the fact that the Court had, just previous to that, erroneously charged that a "conviction must result." Therefore, it would appear that the word "conviction" was uppermost in the Court's mind.

The very fact that this unfair charge was given before the jury had ever deadlocked, thereby necessitating the giving of further instructions, demonstrates, in our opinion, that the instruction was given to coerce the jury. In the case of United States v. Gideon, 52 F. (2nd) 431, the Court criticized the trial court for attempting to give the Allen instruction before the case had been placed in the hands of the jury. The abuse here was even greater than there. In United States v. Allis, 155 U. S. 117, the Supreme Court holds that supplementary instructions are in order only when "the jury have a difficulty in reaching a verdict." The charge here, when weighed against Judge Sanborn's pronouncement in Stewart v. United States, 300 F., l. c. 786, is thoroughly bad. In the foregoing cases the trial courts at least waited until a deadlock arose before interposing.

There are many other errors in the charge to which exceptions were taken.

Does the presumption of innocence survive in a trial where hearsay evidence is admitted to supply the inference of the main essential (implied threat) and the court directs conviction? Did petitioners have a fair trial?

VII.

The Verdict of the Jury Is Inconsistent, Inasmuch as it Finds the Defendants Not Guilty of the Twelfth Count of the Indictment, Which Contails All the Essential Allegations Contained in the First Eleven Counts on Which the Defendants Are Found Guilty.

By acquitting the defendants on the twelfth count the jury thereby found them not guilty of interfering or restraining interstate commerce, because interference and restraint of interstate commerce were the primary essentials of the twelfth count. Interference with interstate Commerce was the primary charge in each of the first eleven counts. If the jury found there was no interference with interstate commerce under the twelfth count, which was predicated upon precisely the same facts as each of the first eleven counts, then to be consistent the jury should have found, and was under a duty to find, no interference with interstate commerce under any count. The gravamen of all counts is interference with interstate commerce. There being no interference under count twelve, there could be none under counts one to eleven. Dunn v. United States, 284 U. S. 390.

In Speiller v. United States, 21 F. (2nd) 682 (C. C. A. 3), it was very aptly said:

> "When the liberty of a citizen is at stake juries will not be permitted to make a plaything of a verdict and blow hot and cold at the same time."

CONCLUSION.

It is therefore respectfully submitted that, for all the foregoing reasons, the petitioners' application for writ of certiorari should be allowed as prayed.

Respectfully submitted,

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